National Association of Letter Carriers, Local 3825, AFL–CIO (United States Postal Service) ***and*** **Howard K. Gross.** Case 5–CB–8347(P)

February 20, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On September 18, 1998, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to adopt the judge's rulings, findings, and conclusions to the extent consistent with this decision.

1. The judge found that Shop Steward Leslie Gaynair refused to provide Charging Party Howard Gross requested grievance documents because he was not a member of the Union and that he made statements to Gross to this effect. For the reasons stated in the judge's decision, we agree that this conduct violated Section 8(b)(1)(A) of the Act.[3]

2. In his decision, the judge further found that Gaynair's article in the Respondent's March 1996 "Unity" newsletter, circulated to members, conveyed unlawful threats of unspecified reprisal or retaliation, which could include refusing to represent employees who complain about union officers or who cooperate with the employer's investigation of union officials. The judge found that in so doing the Union violated Section 8(b)(1)(A) of the Act. Contrary to the judge, we find that the newsletter article written by Gaynair did not convey any unlawful threat, and for the reasons set forth below, we shall dismiss this complaint allegation.

The core allegation raised in the complaint regarding Gaynair's article is whether the Respondent violated Section 8(b)(1)(A) "[b]y impliedly threatening in the union newsletter that employees who make complaints against union officers and who cooperate in Employer investigations of union officers will not be represented by it."

In presenting his case, the General Counsel relied exclusively on the text of the newsletter article written by Gaynair to establish the violation. The following is the full text of Gaynair's article found unlawful by the judge:

> Same old, same old here at the "Hell-hole." New faces, same old bullsh—!! Management has sunken to an all time low. Management has taken statements from two union brothers and used them to issue discipline to a union officer. All this because some scab-ass had a complaint against the union officer. The discipline came from none other than the station manager who "during the investigation" found cause for discipline. What a WIMP!! He is not a station manager, but a fool running scared for his job!! When things are brought to management's attention about the scab-ass, nothing is done. What a whitewash!! To my brothers that wrote the statements, remember what goes around come around. These same two so called union brothers are always in my face making sure that their grievances are being taken care of. I just finished saving one of them from two Letters of Warning and am getting him back pay for Sick Leave that was denied. This is how he repays us.

As background for his consideration of this article, the judge noted that Charging Party Gross had complained to his employer, the Postal Service, about the conduct of fellow employee Rick Sullivan, the Respondent's vice-president. This complaint, supported by additional information provided by two other employees, who were members of the Union, resulted in the Postal Service's imposition of discipline on Sullivan. The judge further noted that Gross was the individual referred to as "the scab-ass" and that he was not a member of the Union during this period.

[1] The judge also issued an Erratum to the decision on October 14, 1998. Correction has been noted and corrected.

[2] In the absence of exceptions, we adopt the judge's dismissal of the complaint allegation that the Union unlawfully refused to represent Gross in a grievance and to answer his letter requests for representation.

[3] Contrary to our colleague, we find no denial of due process in finding that the statements made by Shop Steward Gaynair, when he unlawfully refused to allow employee Gross to have access to grievance documents, were themselves unlawful. The Respondent fully examined Gaynair on his statements, provided other corroborative evidence of the Respondent's policy on access to grievance documents, and briefed the legality of the statements made to the judge. Under these circumstances, we find, contrary to our dissenting colleague, that the issue was fully and fairly litigated, despite the General Counsel's failure to amend the complaint at the hearing. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The refusal to provide the grievance documents was specifically alleged as unlawful, and the statements made by Gaynair are obviously closely related to that refusal. The statements were also thoroughly litigated, and in fact were established by the testimony of the Respondent's own witness.

The judge found that the Union violated Sec. 8(b)(1)(A) by failing to provide Gross copies of his grievance documents but he failed to include this finding in his conclusions of law. We modify the conclusions of law to include this finding.

Contrary to the judge, we do not read this article as a threat not to represent employees who report misconduct by union members. Rather it is merely name calling against Gross, and it criticizes as ungrateful the union-member informants who provided information against a fellow member who was also a union officer. They were called ungrateful because their grievances were always duly processed by union officers. The "what goes around comes around" statement is somewhat obscure, but, in our view, it is reasonably construed as what Gaynair testified he meant it to say—that the two members might find themselves the victims of reports by someone like Gross in the future.[4] We therefore do not find that Gaynair's article represented an implied threat of retaliation in violation of Section 8(b)(1)(A) of the Act.[5]

AMENDED CONCLUSIONS OF LAW

1. The United States Postal Service is subject to the jurisdiction of the Board by virtue of 39 U.S.C. § 1209(a) (the Postal Reorganization Act).

2. The Respondent is a labor organization as defined in Section 2(5) of the Act.

3. By informing Howard Gross, an employee of the unit of employees it represents, that nonmembers were not entitled to copies of their grievance documents, the Respondent has failed to represent him for reasons that are unfair, arbitrary, and invidiously discriminatory, and has breached the fiduciary duty it owes Howard K. Gross and has interfered with rights guaranteed employees under the Act.

4. By failing to provide Howard Gross with copies of his grievance documents, the Respondent has failed to represent him for reasons that are unfair, arbitrary, and invidiously discriminatory, and has breached the fiduciary duty it owes Howard K. Gross and has interfered with rights guaranteed employees under the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The Respondent, National Association of Letter Carriers, Local 3825, AFL–CIO, Rockville, Maryland, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Advising Howard K. Gross and other employees that nonmembers are not entitled to copies of their grievance documents and refusing to provide them with such requested documents.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide copies of the grievance documents requested by Howard K. Gross on April 1, 1996, if that has not been done and the documents are available.

(b) Within 14 days after service by the Region, post at its facility in Rockville, Maryland, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish signed copies of the notice to the Regional Director of Region 5 for posting by the United States Postal Service (USPS), if willing, at all locations where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

[4] We note that the Board has held that a union has a legitimate interest in promoting harmony within its ranks, and except in two specific sets of circumstances, it may lawfully seek to protect this interest even to the point of imposing internal union discipline pursuant to a properly adopted rule prohibiting members from reporting misconduct by fellow members to their employer. *Communications Workers Local 5795 (Western Electric Co.)*, 192 NLRB 556 (1971). Accord: *Letter Carriers (Postal Service),* 316 NLRB 1294, 1303–1304 (1995); *Electrical Workers IBEW Local 1547 (Redi Electric)*, 300 NLRB 604, 607 (1990). There is no evidence or contention here that the Respondent threatened or imposed internal discipline, so there is no occasion to consider whether the reports made by the criticized union members fell within either of the two exceptions to the general rule permitting union discipline for informing. See, e.g., *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156 (1988) (union fine for employee's signing witness statement that was used against a fellow member was unlawful because the statement was foreseeably part of the grievance process); *Oil Workers Local 7–103 (DAP, Inc.),* 269 NLRB 129, 130–131 (1984) (union fine for employee report unlawful both because employee was required by his employer to make such a report and because the report was linked to the grievance process even though a grievance had not been filed).

[5] Our dissenting colleague oversimplifies the above fact pattern in order to reach the conclusion that Gaynair's article conveyed that the Union would no longer handle grievances of employees who had assisted in the Employer's disciplinary proceedings against a union official. In the context of a clear reference to *Employer* discipline of a unit employee based on information provided by other unit employees, the reference in the newsletter to "what goes around, come(s) around," cannot, in our view, be fairly read to mean something other than that further *Employer* discipline could be anticipated, given a pattern of employees informing on other employees.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT advise Howard K. Gross and other employees that nonmembers of the Respondent are not entitled to copies of their grievance documents and refuse to provide them with such requested documents.

WE WILL NOT in any like or related manner restrain or coerce Gross or any other employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL provide copies of the grievance documents requested by Howard K. Gross on April 1, 1996, if that has not been done and documents are available.

NATIONAL ASSOCIATION OF LETTER CARRIERS, LOCAL 3825, AFL–CIO

MEMBER HURTGEN, dissenting in part.

I disagree with my colleagues in two respects. First, I would affirm the judge, essentially for the reasons he sets forth, that the Respondent unlawfully threatened an employee that it would not represent him. Second, for procedural reasons, I would not find that the Respondent unlawfully informed a unit employee that he could not have certain documents because he was not a union member.

In regard to the threat, I agree with the judge that the Respondent Union's newsletter conveyed an unlawful threat. My colleagues and the judge quote the article, which was authored by Shop Steward Les Gaynair. The article was a response: (1) to a unit employees (Howard Gross) who had complained about a union officer/employee to the Employer and (2) to other unit employees who cooperated with the Employer in the subsequent investigation of the union officer/employee's alleged misconduct. The article referred to Gross as a "scab-ass." The article also reminded those "union brothers" who had cooperated with the Employer that "what goes around comes around." Immediately following this remark was a statement that, in the past, the Union had helped the same "union brothers" with their grievances.

Like the judge, I conclude that the Respondent went beyond mere name calling. The Respondent's not-so-subtle message was that it would refuse in the future to represent the "union brothers."

My colleagues rely on Gaynair's after-the-fact explanation (at trial) that he meant only that the two members might someday find themselves to be the victims of reports by Gross. However, the judge found the violations, obviously discrediting Gaynair's after-the-fact explanation. Indeed, the explanation itself is quite lame. There is nothing in the context of the remark to even remotely support it. And, the very placement of the remark in context shows that it was meant to convey the thought that the two members could no longer expect the Union to handle grievances for them as it had done in the past. Finally, even if Gaynair were credited, the article itself creates the reasonable impression set forth above, i.e., that grievances would no longer be handled.

My colleagues assert that the quoted remark is a reference to future *Employer* discipline. The assertion does not withstand analysis. There is no reason to believe that *the Employer* would wish to discipline the employees who complained about union officers. Rather, it is far more reasonable to believe that the Union would discipline employees who complained about the union officers.

The judge further found, and my colleagues agree, that Respondent violated Section 8(b)(1)(A) by telling a unit employee he could not have certain grievance documents because he was not a union member. The complaint did not allege this violation. At trial, Shop Steward Les Gaynair testified, in response to questions from Respondent's counsel, that he told unit employee Howard Gross that "when he was a non-member I told him that he could not have copies of his grievances." However, at trial, the General Counsel did not move to amend the complaint. Rather, on brief to the judge, the General Counsel moved to amend the complaint. In my view, if the General Counsel wishes to amend the complaint, he should do so *at trial*, so that a respondent can offer any defense that it might have. That is fundamental due process. Since fundamental due process was not accorded, I would not find the violation.

My colleagues say, inter alia, that the matter was "fairly litigated." It is difficult to say that an allegation is fairly litigated where, as here, the allegation is made after the trial.

Thomas J. Murphy, Esq., for the General Counsel.
Michelle Dunham Guerra, Esq. (Cohen, Weiss & Simon), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This matter was heard by me on May 21, 1998, in Washington, D.C. Based on an unfair labor practice charge filed on July 5, 1996, by Howard K. Gross against the National Association of Letter Carriers, Local 3825, AFL–CIO (the Respondent or the Branch), the Regional Director for Region 5 of the National Labor Relations Board (the Board) issued a complaint dated September 25, 1997. The complaint alleges that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by threatening employees, failing to provide employees grievance documents, and refusing to process the grievance of Gross.[1] The Respondent filed an answer to the complaint denying the commission of any unfair labor practices.

On consideration of the entire record, including posthearing briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The United States Postal Service (the Employer) provides postal and mail services for the United States of America and operates various facilities throughout the country in performance of its functions, including several facilities in Rockville, Maryland, which include the Potomac and Pike stations. The Board has jurisdiction over the Employer's operations in this matter by virtue of Section 1209 of the Postal Reorganization Act (the PRA).

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondent, an affiliated local or branch of the National Association of Letter Carriers, AFL–CIO, and the National Association of Letter Carriers, AFL–CIO, are now, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Background Facts

Howard K. Gross has been continuously employed by the Postal Service as a city letter carrier for almost 19 years; he has always worked out of the Employer's Potomac station. Gross joined the union sometime prior to 1984 but quit in that year; he rejoined in October 1996 and currently is a member of Branch 3825. At one point, he was appointed as an assistant shop steward at Potomac.

Branch 3825 maintains an office in Rockville, Maryland, but its official mailing address is a post office box located a short distance away at the Employer's Pike station facility. Kathy Schultz, a full-time letter carrier, serves as president of the Branch, a position she has held continuously for the last 7 years; she is also chief steward for the Branch. The Branch's other principal officers are Rick Sullivan, vice president, and Leslie Gaynair, sergeant-at-arms and shop steward. Sullivan and Gaynair are also full-time letter carriers who work out of Potomac. Neither Schultz, Sullivan, nor Gaynair has any responsibility or role regarding the handling of Branch mail, particularly with respect to picking it up from the Branch's post office box. Ken Lerch (vice president in 1996) and Shirley McFadden (recording secretary), themselves full-time letter carriers, performed this function as their time and convenience permitted.[2] The Respondent admits, and I find, that both Schultz and Gaynair are agents of the Respondent within the meaning of Section 2(13) of the Act.

The National Association of Letter Carriers (National Association) has a fairly extensive history, going back 20 years or more with the United States Postal Service, and is and has been the exclusive bargaining representative of all unit employees—city letter carriers—who are free to remain nonmembers. The pertinent and current collective-bargaining agreement between the National Association and the Employer covers the period 1996 through November 20, 1998, and includes a progressive grievance procedure culminating in final and binding arbitration.[3]

In step 1 of the grievance procedure, an aggrieved employee must discuss the grievance with his immediate supervisor within 14 days of the date on which the employee learned of its cause. The employee at his option may be represented by a union representative at this stage. If no resolution of the grievance is reached through "discussion," the employee's supervisor must render an oral decision stating reasons therefore; the

[1] At the hearing, the General Counsel orally moved to amend the complaint in par. 7 to include the allegations contained in par. 5 as violations of Sec. 8(b)(1)(A) of the Act. Counsel for the Respondent opposed the amendment and in her brief argues that the amendment is time barred by Sec. 10(b) of the Act. I allowed the amendment at the hearing over the Respondent's objection, because I viewed the omission of reference to par. 5 allegations in the charging paragraphs as a technical deficiency, possibly an oversight in the drafting of the complaint by the Regional Director. I noted at the hearing that the Respondent was clearly on notice of the charges and had in fact denied the allegations in its answer. Moreover, on the issue of notice, the Respondent was or should have been aware that it was being charged with possible violations of the Act involving threats to employees since January 11, 1996 (see GC Exh. 1(a); the allegations in par. 5 relate to alleged conduct—threatening of the Respondent—occurring on or about March 1996. Therefore, the Respondent could not justifiably claim unfair surprise or prejudice by the allowance of the amendment. Similarly, it cannot be gainsaid that on the authority of 1(b) of the Act, the charge is time barred. Finally, I note that it is well settled that particularity of pleading is not required of a complaint issued by the Board, *Bob's Casing Crews, Inc. v. NLRB*, 458 F.2d 1301, 1304–1305 (5th Cir. 1972), especially where the Respondent was on notice of the nature of the charges for months prior to the hearing date.

[2] Neither party called Lerch or McFadden as witnesses. However, Schultz credibly testified that the Branch mail generally was picked up once per week if Lerch picked it up; if McFadden was assigned the mail pickup, pickup was less frequent, and on occasion McFadden kept the mail in the trunk of her car for a while (as long as a week) before bringing it to the office. According to Schultz, Lerch picked up the Union's mail in April 1996.

[3] This agreement is contained in GC Exh. 3. This contract is referred to as the 1994 National Agreement which is binding on all affiliated letter carrier branches; the agreement was entered into by the parties pursuant to an arbitration award issued August 19, 1995.

decision must be given generally no later than 5 days after the decision is rendered to the employer or his union representative. Appeals beyond step 1 must be undertaken by the Union on behalf of the aggrieved employee within 14 days (at step 2) of the date the employee (or the Union) first learned or may reasonably have been expected to have learned of the adverse decision.

At all material times, either Kathy Schultz as chief steward or Leslie Gaynair as steward, but most principally Gaynair,[4] was responsible for handling member and nonmember employee grievances at either step 1, step 2, and beyond.[5] Generally, if Gross wanted to grieve a matter, he would advise his supervisor that he (Gross) needed to talk to the shop steward—Gaynair—and the supervisor would then approach Gaynair who would then consult with Gross about the matter at issue. The Branch successfully represented Gross in seven grievance proceedings for the period covering March 30, 1993, through February 27, 1998; three of these grievances were processed by the Union to the arbitration level.[6]

The Branch at its expense published generally on a monthly basis a newsletter entitled "Unity," which was distributed only to members (active and retired) to keep them informed of matters of interest to the membership and to advocate for union causes and concerns.[7] During 1996, Rick Sullivan served as editor of the newsletter and occasionally wrote articles on topics of interest for the Branch. Schultz and Gaynair also were regular and fairly longtime contributors whose columns dealt with various issues of topicality to the Branch and its members.[8] Gaynair submitted his articles to Sullivan, but generally Sullivan made no changes in the articles unless he consulted with Gaynair. The newsletter was generally passed out to the members by the shop stewards at the five stations coming under the Branch's jurisdiction or mailed to retired members.

B. The Charges

The General Counsel has alleged that the Respondent violated Section 8(b)(1)(A) of the Act:

1. By impliedly threatening in the union newsletter that employees who make complaints against union officers and who cooperate in Employer investigations of union officers will not be represented by it.

2. By arbitrarily and discriminatorily refusing to represent Gross in a grievance, answer his letter requests for representation, and provide him copies of his grievance documents.

Based on testimony adduced at the hearing, the counsel for the General Counsel in his brief contends that the Respondent on or about April 1, 1996, also violated Section 8(b)(1)(A) by and through its agent's (Gaynair) telling Gross that because he was a nonunion member, he could not have copies of his grievance documents. Consequently, the General Counsel seeks posthearing an amendment of the complaint to reflect this charge. He contends that the matter was fully and fairly litigated at the hearing and should be allowed.

The Respondent denies any violations of the Act as alleged specifically in the complaint. In its brief, the Respondent, in essence, denied any violation of the Act with respect to Gross' request for grievance documents on April 1.[9]

C. Applicable Legal Principles

Section 8(b)(1)(A) of the Act provides, in pertinent part, that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules unless with respect to the acquisition or retention of membership therein . . . .

As a general proposition, violations of Section 8(b)(1)(A) essentially involve unlawful union conduct including economic threats, coercion, or reprisal against unit employees or breach of the union's duty of fair representation.

The Board in *Steelworkers Local 1397*, 240 NLRB 848 (1979), enunciated what now may be considered controlling legal principles regarding coercive statements alleged to be violative of Section 8(b)(1)(A). In *Steelworkers*, the Board states as follows:

> [T]he test of misconduct is not what [a union official] may have subjectively intended by his comments, nor whether any employee was, in fact, coerced or intimidated by the remarks. Rather, the test is whether the alleged offender engaged in conduct which tends to restrain or coerce employees in the rights guaranteed them in the Act. That an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7 is, or course, elementary. Thus, we have previously held that a threat to have an employee discharged in retalia-

[4] As will be discussed later herein, Gross and Schultz did not get along with each other very well at all. To say this relationship was hostile is a dramatic understatement. Accordingly, Schultz never represented Gross in any grievance proceedings, nor did he ever ask her to represent him.

[5] Based on the credible evidence, it appears that employees at the Potomac station generally asked Gaynair to represent them in all grievance matters. Gaynair, in turn, reported to Schultz and kept her apprised of all the cases on which he was working.

[6] The parties stipulated and agreed that the Branch had represented Gross in these proceedings, the last of which was resolved on February 27, 1998. Gaynair himself represented Gross in grievances commenced on April 19 and August 9, 1995, and November 19, 1996. It is noteworthy that the March 30 and August 13, 1993 grievances against Gross were handled by the Branch and related to Gross' alleged physical attacks on Schultz.

[7] For reasons not disclosed on the record, the newsletter was not always published monthly.

[8] Schultz' column was entitled "The President's Report." Gaynair's column carried the byline "Tales from the Potomac." See Exhs. 2, 4, and 5. Gaynair has been contributing to the newsletter since 1990; Schultz evidently wrote her column ex officio.

[9] The complaint does not contain the specific allegation, and the request for amendment was never raised at any time in the hearing by the General Counsel. Inasmuch as the General Counsel raised the amendment in question for the first time in his brief, the Respondent presumably did not have the opportunity to state its position regarding the requested amendment. I will assume then that the Respondent would oppose this amendment; accordingly, I will sua ponte interpose its opposition prior to my ruling which follows herein.

> tion for that employee's dissent over intraunion matters violates Section 8(b)(1)(A). We have likewise held that union threats to employees that the union would not represent them also violates Section 7, particularly when made by a union officer with the apparent capability of effectuating the actions threatened. [Citations omitted.]

Similarly, in cases where the union has been charged with failing to honor or uphold its duty of fair representation in violation of Section 8(b)(1)(A), the Board has established fundamental general principles governing these cases. In *Letter Carriers Branch 6070*,[10] the Board proclaimed:

> A union owes all unit employees the duty of fair representation, which extends to all functions of the bargaining representation. When a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith, it breaches its duty of fair representation. But a union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be "highly deferential." Mere negligence does not constitute a breach of the duty of fair representation. And a union's conduct is arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.

The duty of fair representation has been likened to the duty owed by other fiduciaries, e.g., trustee/trust beneficiaries; attorney/client; corporate officers; and directors/shareholders. A union officer thus owes employees a duty to represent them adequately as well as honestly and in good faith. *Airline Pilots Association International v. O'Neill*, 500 U.S. 913 (1991).

Consequently, the union must show a legitimate union interest with regard to its policies, bans actions, or failures to act as these relate to rules governing its internal procedures. *Carpenters Local 35*, 317 NLRB 18 (1995).

D. The March 1996 Newsletter Article

It is undisputed that Gaynair authored the following passage in his March 1996 "Unity" newsletter column, "Tales from Potomac":

> Same old, same old here at the "Hell-hole", New faces, same old bullsh—!! Management has sunken to an all time low. Management has taken statements from two union brothers and used them to issue discipline to a union officer. All this because some scab-ass has a complaint against the union officer. The discipline came from none other than the station manager who "during the investigation" found cause for discipline. What a WIMP!! He is not a station manager, but a fool running scared for his job!! When things are brought to management's attention about the scab-ass, nothing is done. What a whitewash!! To my brothers that wrote the statements, remember, what goes around come [sic] around. These same two so called union brothers are always in my face making sure that their grievances are being taken care of. I just finished saving one of them from two Letters of Warning and am getting him back pay for Sick Leave that was denied. This is how he repays us.[11]

This article owes it genesis to an incident occurring on or about January 12, 1996, involving Gross and Rick Sullivan. Gross testified about the matter. According to Gross, a problem developed on the working floor at the Potomac facility and Sullivan, in the presence of others, called him a "m— f—g scab." Later that day, Sullivan slammed a door in Gross' face and tried to prevent him from using a doorway. Gross returned to work the next day and the situation between Sullivan and him worsened; Gross then decided to call the local police. On their arrival at that station, the police advised him that the matter was noncriminal and suggested to Gross that he pursue appropriate administrative remedies. According to Gross, that same day, Schultz, who worked next to him, called him an "asshole," presumably, for calling the police in on the matter. On or about January 15 or 16, 1996, Gross wrote letters to the National Association's business agent, A. P. Martinez, and the Rockville postmaster, Thomas Allshouse, complaining about his treatment by both Sullivan and Schultz.[12] On or about February 27, Postmaster Allshouse, by letter, responded to Gross' complaint and advised that some corrective action (not disclosed) had been taken.[13] The "Unity" article by Gaynair was published in the aftermath of whatever action the postmaster had taken with respect to Gross' complaint.

Gaynair testified about the March article. Gaynair freely admitted that the union officer referred to in the article was Sullivan; the two referenced cooperating union members were Kevin Norman and John Sutherland; and it was Kevin Norman in particular that he was referring to in terms of having been "saved" from letters of warning issued by the Employer.[14] Gaynair admitted that, in his view, Sullivan was disciplined as a result of Gross' complaint and that the "scab ass" referred to in the article was Gross.

Gaynair explained what he meant by the statement, "what goes around comes around." First, the statement was directed to the union members (Norman and Sutherland) and, second, he was merely warning them that what happened to Sullivan could happen to them. That is, as Gaynair testified:

[10] 316 NLRB 235, 236 (1995).

[11] See. GC Exh. 4. The passage above appeared on p. 4 of the March 1996 "Unity" Newsletter.

[12] See GC Exh. 8. Gross wrote a followup letter to Martinez and Allshouse on February 13, 1996, expressing his displeasure at not having received a response to his January letter and reiterating his concerns about issues raised in the earlier letter. (See GC Exh. 9.)

[13] See GC Exh. 11. Allshouse indicated that some "appropriate corrective action" was being undertaken but due to "confidentiality issues," he could not disclose what specific actions had been taken against Sullivan.

[14] The parties stipulated and agreed that the Employer issued a letter of warning to Kevin Norman on February 13, 1996, for failure to follow instructions. It was also agreed that a step 1 grievance was handled by Gaynair on Norman's behalf, and the letter of warning was reduced to an official discussion. [Note: the collective-bargaining agreement includes a progressive discipline procedure; discussion is a first level disciplinary device prescribed for minor offenses; a discussion type of resolution is not considered discipline and is not grievable. See GC Exh. 3, art. 16.]

> On [sic] other words, John Sutherland and Kevin Norman, anybody else could've [sic] write statements against them and management can take the course to discipline them. [Tr. 178.]

According to Gaynair, his focus was not on Norman and Sutherland's union membership status.[15]

According to Gaynair, he did not intend to threaten the members but was warning them that "if you are going to write a statement against a brother or sister [union member], that in the future if somebody does this against you, you can expect the same result of [sic] management." This "warning," according to Gaynair, had nothing to do with his duty to represent the members, which he acknowledged he had to fulfill regardless; and he did not intend to threaten to withhold representation from any member because of their cooperation with management or for any reason.[16]

Consistent with the aforementioned governing principles and Board precedent, I find that Gaynair's article conveyed unlawful threats of unspecified reprisal or retaliation, which could include refusing to represent employees who complain about union officers or who cooperate with the employers in investigation of union officials. I would conclude that in so doing, the Respondent violated Section 8(b)(1)(A). My reasons are as follows:

First, contrary to the argument of the Respondent, I do not deem Gaynair's article to be protected speech. I recognize, as pointed out by the Respondent in its brief, that Gaynair is entitled to express his views about union matters or the Employer and that he may use acrimonious, offensive, and even provocative language in so doing. In my view, calling Gross or other nonmembers scabs or even the more vituperative "scab ass" is permissible under the Act. I also recognize, as does the Respondent, that all speech is not protected either by the Courts or by the Act itself.[17] In my view, Gaynair in the March article went considerably beyond the pale of protected speech, as he admitted "warning" both members and nonmembers alike, that he clearly did not approve of unit employees, but especially union members, either complaining about a union official or assisting management in the investigation of the union official who ultimately was disciplined by management based on that complaint and the cooperation of two members. While Gaynair denied that he intended not to represent complaining or cooperating unit employees, or in other ways discriminate against or threaten or coerce them, I find that in the total context of matter, the legal and factual landscape as it were, Gaynair's language could reasonably coerce or intimidate employees in the free exercise of their Section 7 rights, which I conclude includes their making complaints about union officials' behavior and giving statements to management about or regarding the complaint in question. As instructed by the Board, I am not bound by or, in Gaynair's case, convinced of his explication of the meaning of the article or his expressed intent not to threaten unit employees or deprive them of their contractual right to union representation. In my view, both the tone and tenor of the offending passage is clearly threatening and coercive.

Significantly, what with the name calling, coupled with Gaynair's undisguised pique over the members' seeming disloyalty and lack of gratitude for the Union's (his) successful representation of one of the cooperating members, Gaynair's words have, to me, a magnified coercive effect because he, beyond a doubt, was a person with the apparent and actual authority and capability of acting on his threats. It is also of some note that the contretemps between Gross and Sullivan was probably well known at the station, considering Gross' volatile history with the Branch and its officers, the public use of foul language, the high emotion, the police involvement, and Sullivan's ultimately being disciplined by the Employer mere weeks before the publication of the article. Thus, the article cannot reasonably be viewed as having a neutral or benign context or, as the Respondent contends, a mere expression of Gaynair's personal opinion. On the contrary, Gaynair was the person whom the unit employees turned to vindicate their Section 7 rights, particularly for grievance assistance. Clearly discernible from the article was Gaynair's anger with Gross and the two union members for their roles in Sullivan's discipline. In fact, in my view, the article clearly evinced Gaynair's vehement disapproval of Gross' complaint and an even stronger disapproval of the two union members who gave statements to the Employer. Moreover, in the article, Gaynair brought up his prior successful representation of a cooperating union member and with evident bitterness says, "This is how he repays us [the Union]." In context of the entire affair, Gaynair's article implied (or it could, with certainty, be reasonably inferred) that the Union might not represent members, Gross, or other unit employees who complained about union officers or who cooperated with the Employer in the investigation of union officers, or that the Union might retaliate against such employees in other ways. In my view, on this record, the General Counsel has well established a violation of Section 8(b)(1)(A) of the Act with regard to Gaynair's March article.

E. The April 12 and 24, 1996 Requests for Grievance Assistance and Documents

Gross testified that on or about April 9, 1996, he received a notice of suspension from the Employer for allegedly failing to comply with its safety rules and regulations.[18] According to

[15] Gaynair testified that he had also represented Norman in a grievance matter before he joined the Union. Neither Norman nor Sutherland testified at the hearing.

[16] Gaynair admitted, however, that he did not think it appropriate for union members to give statements against other union members. (Tr. 207.)

[17] "Free speech" under the Act as a guarantee for both employers and unions is included in Sec. 8(c) of the Act. It provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Notably, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1947), the Supreme Court held that this provision implemented the First Amendment of the Constitution. There, the Court noted, however, the protections afforded to speech by Sec. 8(c) are not absolute.

[18] The suspension notice is contained in GC Exh. 12. It was issued by Gross' supervisor, Terri Vanover, who set out the nature of the

Gross, on April 12, 1996, he prepared a letter to the Branch requesting representation in several grievances that were pending and copies of all related papers and procedural grievance forms where he was designated as the grievant.[19] Gross claimed to have mailed this letter by regular first class mail on about April 13, to the Branch at its post office box address. After mailing the letter, Gross claimed to have a conversation in the station parking lot with Schultz in which he advised her that he wanted representation for the grievance, and that he had not gotten a response from the Branch regarding his letter.[20] According to Gross, Schultz told him he was a "scab," that he cost the Branch a lot of money (in representing him), and that the Branch would get to his grievance when it had time. After this conversation with Schultz, Gross then spoke to his supervisor, Vanover, pursuant to the step 1 grievance procedure. The following week (a week to 10 days after receipt of the suspension), Vanover responded to his grievance and denied it.[21]

As Gross had not received a response from the Branch, he testified that he called the Board and was advised by an employee (the information officer) to send the Union a certified letter requesting representation. Acting on this advice, Gross, on April 26, mailed a letter—dated April 24—identical in wording to his prior letter by certified mail to the Branch post office box. However, this letter was ultimately returned to him by the postal service because it was never claimed by the addressee[22] on about May 31. However before receiving the unclaimed letter, Gross filed a lost mail report with the postal service on May 30, in attempt to trace the certified letter.[23] Gross acknowledged that after the April 24 letter was returned to him, he did not approach anyone from the Union about the matter.

As to the suspension notice, Gross testified that he felt that it was improperly and unfairly issued on the one hand and on the other, the penalty was excessive, calling as it did for a loss of a week's pay. Thus, he wanted seriously to contest it.

Regarding the processing of his grievances, Gross admitted that the Branch had processed his grievances on occasions before April 1996 as well as afterwards, and that Gaynair had assisted him with most of these grievances. According to Gross, he did not speak to Gaynair about his April 8 suspension because Gaynair had written the allegedly threatening article about him, and he did not feel "comfortable" in dealing with Gaynair.

However, Gross conceded that after receiving the April 8 notice, he approached Gaynair about other grievance matters such as the July 1996 grievance he had filed. Gross further testified that he never spoke to Schultz or Sullivan about the letters he sent to the Branch and, specifically, never mentioned to Schultz that he had received a suspension notice in the previously mentioned parking lot conversation.

Gaynair and Schultz testified regarding Gross' two letters and both denied having ever received the letters. Moreover, both denied any knowledge of Gross' April 8 suspension or his request for union representation and assistance in that matter.

According to Gaynair, he has filed grievances on behalf of members and nonmember unit employees, including Gross, and has never refused to represent any employees. Gaynair recognized that he is in fact obliged to represent nonmembers because the Employer does not require employees to belong to the Union. According to Gaynair, as shop steward he did not have any responsibilities for the union mail.

Schultz testified about her relationship with Gross both personally and with regard to union matters. According to Schultz, although she was the president and chief steward for the Branch, Gross never came to her regarding union management issues; in fact, he avoided her "like the plague," although they park side by side.[24] As far as she was concerned, Gross always went to Gaynair for grievance representation if he did not elect to represent himself at the step-1 level.

Schultz denied talking to Gross in the parking lot or anywhere else regarding the April 8 notice, essentially because of their poor and uncommunicative relationship. She specifically and emphatically denied telling him that the Union would han-

violation and advised Gross of his right to file a grievance pursuant to the collective-bargaining agreement within 14 days of his receipt of the notice.

[19] See GC Exh. 13, which incorporates a copy of Gross' letter.

[20] Gross and Schultz are assigned carrier routes 47 and 46, respectively; their delivery vehicles occupy designated lot spaces corresponding to the route numbers and are parked side by side. Gross and Schultz have parked next to each other for a number of years.

[21] According to the collective-bargaining agreement, at step 1 of the grievance process, the grievant must discuss the grievance with his immediate supervisor within 14 days; the grievant may represent himself. The supervisor has authority to settle the grievance at this stage, but if she does not, she must render an oral decision to the grievant stating her reasons therefore no later than 5 days thereafter. Within 5 days after the supervisor's decision, the supervisor, at the request of the union representative, must initial a standard step-2 grievance form confirming the date on which the decision was rendered. The Union is entitled to appeal this decision to step 2 of the grievance procedure within 10 days after receipt of the supervisor's decision. (See GC Exh. 3, pp. 66–67.) Vanover did not testify at the hearing. Vanover's initialed decision (assuming one exists) was not produced at the hearing.

[22] This letter is contained in GC Exh. 14; GC Exh. 15 is the envelope in which this letter was sent. Notations on the envelope by the postal service indicate that the first delivery was attempted on April 29 and again on May 7, and it was returned to Gross on May 17 as unclaimed. Gross' return address, but not his name, is visible on the return receipt. The green card with his name and address was taped face down on the envelope.

[23] The Mail Loss Report filed by Gross is contained in GC Exh. 17 and indicates that Gross received a reply from the Postal Service on June 12, 1996, stating that the mail was returned to sender on May 24, unclaimed. It is significant to note at this juncture that Gross never put in a mail trace for the April 12 letter, although clearly the mail loss form would permit a trace of regular first class mail.

[24] As noted earlier herein, Gross was accused on two occasions of having assaulted Schultz. In fact, they both have undertaken legal action, criminal and civil, against one another at various times over the years. For instance, Schultz brought criminal charges against Gross for a pushing incident; however, the case was dismissed. Gross then filed a civil action against her. In her August 1995 newsletter article, Schultz mentioned Gross' suit against her and its costs to the Branch. She also mentioned other problems and matters critical of Gross. Schultz testified that she mentioned Gross' lawsuit in the article to let the members know how their dues were being spent, that is, in defense of and what she views as his frivolous suits. (See GC Exh. 2.)

dle his grievance when it had time;[25] and that Gross never mentioned the grievance or its status to her. Regarding mailing procedures at the Branch, Schultz had no responsibility for mail pickup, which duties were shared by the Branch vice president (Lerch) or the recording secretary (McFadden).[26] According to Schultz, during April 1996, Lerch was also responsible for opening the mail and he never informed her of any mail from Gross or any certified mail delivery notices for which he would be responsible. Schultz acknowledged that the Branch receives its certified mail at the post office box and in fact has received on other occasions certified mail from Gross. However, the mail pickup by the Branch is not always prompt or timely, that mail pickup delays are not unusual.[27] Schultz testified that she never saw Gross' April 12 or 24 letters, during the time of their alleged mailing and was unaware of whether the Branch ever received them until the instant unfair labor practice charges were filed.

In essence, the General Counsel contends that the Respondent discriminatorily and arbitrarily and, hence, unlawfully refused to process Gross' grievance and provide him with grievance documents. He argues that the Respondent's hostility toward nonmembers generally, and Gross specifically was clearly proven and, as such, supplies the motive for not processing his April 12 and 26 grievance requests, or acting on his request for grievance documents. The General Counsel contends that Gross' first-class April 12 letter, was never returned to him, suggesting that it was received by the Branch, and the certified letter was returned because the Branch arbitrarily refused to pick it up. These facts, it is argued, indicate prima facie arbitrary, unreasonable, and discriminatory conduct on the Respondent's part. That is, in short, the Respondent actually received the first letter but ignored it and the request for assistance; the Respondent then willfully and arbitrarily refused to claim the certified letter.

In my view, the resolution of this charge redounds, as is often the case, to credibility. First, it must be noted that Gross and the Branch and its officials were charitably not on good terms, but the hostility that existed between them was a two-way street. Second, the ill will between them did not stand in the way of the Branch's representation of Gross (even where he was disciplined for alleged physical assaults by him against the Branch president) prior to the instant unfair labor charges, and afterwards. Thus, in my view, contrary to the General Counsel, I am not persuaded that the animosity between Gross and the Respondent in any meaningful way supports a finding of a violation. In my view, the charge rises and falls on one point with several parts—that is the Union's awareness of the April 8 notice of suspension, and its awareness that Gross wanted the Union to represent or assist him in resolving the charge; and, if it was aware, whether the Branch arbitrarily or discriminatorily refused to act on that knowledge in breach of its duty of fair representation. First, I would conclude that based on the credible testimony of both Gaynair and Schultz, the Branch was not aware of Gross' receipt of the April 8 suspension notice.[28] I would further conclude that the Respondent was not at any material time aware of Gross' requests (in either of the two letters); therefore, I cannot find that the Respondent violated the Act with respect to Gross' request for representation and grievance documents. My reasons are as follows:

Starting nonchronologically, it is undisputed that the Branch did not receive the April 24 certified letter. On this record, I do not believe that the Branch acted out of wrongful motive in not claiming the letter. It seems to me that the Branch's mail-handling procedures were somewhat haphazardly performed. Of course, the persons charged with these duties were not called as witnesses, so what actually may have happened cannot with accuracy be known. In any event, I do not attribute any ulterior motive to the Branch with regard to the April 24 letter's not being claimed. Therefore, I conclude that the General Counsel has not established that the Branch acted arbitrarily, unreasonably, in bad faith or, more pointedly, out of retaliation for Gross' complaints against a union officer in not claiming the letter in question. I note that Gross chose the certified mail method to contact the Branch. However, this was not the only avenue open to him. He could have put sense before pride and actually spoken to Gaynair and even Schultz, both onsite and available, to protect matters evidently of serious concern to him—namely, his job and his pocketbook. Gross could also have taken a copy of his request to the Branch offices. This would especially seem sensible in light of his claim that he had received no response to a letter he claims to have sent 2 weeks earlier and his claimed unwillingness to deal with the Branch's onsite stewards at the time. Instead, Gross elected to call the Board for advice, not his union; he then sends a certified letter to a post office box not personally addressed to a union official. Gross then undertakes a mail trace instead of going to the Union and getting the matter attended to directly. In my view, Gross was well acquainted with the grievance procedures and was equally aware that his appeal rights under the grievance procedures were time-sensitive. Yet he took a very convoluted approach fraught with potential delay to vindicate his rights. The Branch's mail-handling procedures are seemingly inadequate; however, this inadequacy does not rise to the level of an unlawful failure to represent employees. Thus, I would conclude that the April 24 certified letter was not claimed by the Branch through negligence or inadvertence, and not out of any animus toward Gross. Therefore, the Branch was not on notice of Gross' request for representation or grievance documents at that time. Accordingly, the Branch, without having actual or

[25] I pointedly and repeatedly asked Schultz whether she had any conversations with Gross during the period covering April 1 through 24, 1996; she responded no, pointing out that "he [Gross] avoids me" or "he doesn't approach me." (Tr. 232.) To my pointed questioning, Schultz also admitted that she didn't care for Gross either; theirs was a mutual dislike. (See Tr. 240.)

[26] Lerch and McFadden work at Pike station where union mail is sent.

[27] As an example of this, Schultz related that the Branch received a subpoena to Gaynair in the instant case addressed to its post office box and it was not picked up immediately. A notice was left in the box and the Branch secretary picked it up and later brought it to the Branch office.

[28] It is undisputed that the Branch did not routinely receive notice of the Employer's proposed discipline of unit employees. Generally, the Branch only became involved in the grievance after a step-1 denial.

constructive knowledge of Gross' requests, cannot be said to have breached its duty to him. In reaching this conclusion, I have credited the testimony of both Gaynair and Schultz regarding their denials of knowledge of Gross' suspension notice, his request for grievance assistance. I also find credible their lack of involvement with the Branch's mail-handling (pickup) procedure.

Regarding the April 12 first-class letter Gross claims to have mailed to the Branch, I am not convinced that he mailed this letter at all. First, the Branch officials called to testify credibly disavowed any knowledge of the Branch's having received this letter and they had no knowledge otherwise of his request contained in the letter. Second, the letter has never been returned to Gross as undeliverable as would be the seemingly usual case. These factors alone cast much doubt on Gross' testimony which, as he admits, is the only "proof" of his having mailed the letter.

I must note that Gross did not impress me as a witness. I found him to be markedly less than forthright in many of his responses, and he appeared to be stalling for time to fashion a response to questions by the Respondent's counsel by either offering a nonresponse or asking for the repeating of questions calling for simple responses. In this regard, on more than one occasion, I admonished him, as did the Respondent's counsel. Gross was also inconsistent in his testimony, offering confusing accounts of his contacts with the Board and claiming at one point having never communicated with Schultz, yet confronting her in the parking lot on one occasion about his grievance. Also, Gross claimed he was uncomfortable in dealing with Gaynair, yet he approached Gaynair on April 1, about grievance documents. In addition to his being less than credible testimonially, my doubts about his not having mailed the letters are buttressed by his failure to seek a mail trace of this April 12 letter, as he did with the aforementioned certified letter. Surely, if he had actually mailed this letter and had gotten no response from the Respondent, logic and common sense suggest that he would undertake a trace of *both* letters at the same time; yet he did not. In any event, the General Counsel's burden is to establish this material fact by the preponderance standard, and I cannot, for the foregoing reasons, credit Gross' testimony regarding his mailing of the letters, especially in the face of credible denials by the Branch's officers.

Accordingly, I would find that the counsel for the General Counsel has in total failed to meet his burden of proof regarding the Union's alleged breach of its duty of fair representation stemming from Gross' letters requesting representation and grievance documents, and I would recommend dismissal of this part of the complaint.

F. Gross' April 1, 1996 Request for Grievance Documents

In spite of being "uncomfortable" with Gaynair in the aftermath of Gaynair's March article on April 1, Gross asked Gaynair for copies of documents related to a pending grievance (but not the April 8 suspension). According to Gross, he made the request early in the morning on the workroom floor at the station. Gaynair told him that he could not have copies of these documents because he was not a member of the Union.

The Respondent called Gaynair in its case–in–chief and asked him about this encounter. Gaynair could not remember whether Gross approached him in April 1996 about grievance documents, but remembered that Gross had asked for grievance documents in the past on more than one occasion. According to Gaynair, he told Gross, consistent with the Branch's policy as determined by the Branch's president, that the Union only provided grievance-related documents to employees (members and nonmembers) in settled (final) cases. Gaynair admitted that he told Gross he could not have copies because he was a nonmember. (Tr. 190.) Surprised, the Respondent's counsel sought clarification of the policy. Gaynair then went on to say that he told Gross, "When he was a non member, that he could not [get] copies of his grievances. When he became a member and his grievances were still active, I told him that he couldn't get any copies because [the] grievance was still going on through the system . . . . The distinction is, ma'am, is that if you are a non member—okay?—the Union does not have to give you copies of anything." (Tr. 191.)[29]

The Respondent also called Schultz to explain the Union's grievance documents policy and procedure.

According to Schultz, normally when employees request copies of grievance documents, they are asking for a copy of the settlement (disposition) papers.[30] Thus, when members of the Union request copies, the Branch will make the copies for them. Nonmembers are allowed access to the requested documents and may copy them on their own. According to Schultz, this policy was not generally explained to all the officers. However, Schultz had at one time explained the policy to Gaynair who had inquired of her whether he could provide Gross (then a nonmember) copies of his grievance papers. Schultz told Gaynair that Gross was a nonmember, he was free to come to the Branch office and make copies. Schultz went on to explain that as a consequence of Gross' instant charges, the Branch changed its policy and she was directed by Business Agent Martinez to make copies for Gross if he so requests.

The General Counsel contends that Gaynair's informing Gross, that he could not have documents because he was not a member of the Union, is clearly violative of Section 8(b)(1)(A). As noted earlier, this alleged violation was not charged in the complaint, but was sought by way of a request for amendment by the General Counsel in his brief.

This gives rise to important issues relating to notice, prejudice, and basic fairness to the Respondent.

[29] Based on extensive questioning by me about the Union's policy regarding providing copies of grievances documents, Gaynair attempted to clarify further the operative policy. On balance, after admitting some confusion on his part, Gaynair seemed to say that the Union's policy was to provide members and nonmembers alike copies of grievance documents in settled cases. According to Gaynair, no employee could obtain copies of grievance documents in cases that were ongoing or unresolved because, in his view, it would be premature.

[30] This assertion by Schultz was not challenged. However, I recognize that grievance documents could very well include information other than the settlement documents, for example, information provided by witnesses or various reports generated by management of the matter being grieved.

I have considered the propriety of allowing this late hour amendment, giving due consideration of the policies of the Act, and the possibility of unduly prejudicing the Respondent, and have concluded that considering the totality of circumstances that I will allow the amendment. My reasons include, first, recognition that the offending statement was expressed by an important union official—the shop steward and sergeant-at-arms, and the statement itself is on its face discriminatory, arbitrary, and irrational. While not charged in the complaint, the Respondent, probably sensing that it had stepped on a land mine, addressed the statement and the Union's policy underlying it fairly extensively in the hearing. Also, because of my sensitivity to the issue in terms of the policies of the Act, I conducted my own interrogation of both Gaynair and Schultz regarding the Union's handling of requests for grievance documents. Then, too, in her brief, the Respondent's counsel extensively dealt with and contested the issue and charges, thus indicating that the Respondent considered the issue of legal significance, albeit not specifically charged in the complaint. Finally, the statement itself was clearly related both in time, circumstance, and substance to the original complaint. Clearly, the Respondent was on notice that it was being charged with violating its duty of fair representation (to Gross) and that an integral aspect of the charges related to the Respondent's alleged failure to provide Gross, a nonmember at the time of the alleged violation, with grievance documents. At the center of the controversy was, of course, Gaynair who admittedly strongly disapproved of nonmembers. Thus, in sum, it cannot be gainsaid that the Respondent would be prejudiced or unfairly surprised by the lateness of the requested amendment nor that it had been given an opportunity, fully and fairly, to litigate the matter. Moreover, because of the patently discriminatory nature of the statement and out of my concern for administrative judicial economy, the amendment is allowed. *Koons Ford of Annapolis*, 282 NLRB 506 (1986).

Directing myself to the on-the-record statement by Gaynair, I would conclude that in the context of the totality of the factual and legal circumstances of this cause, the Respondent violated Section 8(b)(1)(A) of the Act by and through Gaynair's statement to Gross. I am aware that Gaynair was not the architect of the Respondent's policy for providing grievance documents and in fact may have misconstrued and misapplied the policy generally and specifically as to Gross out of confusion or for other extenuating reasons. To her credit, Schultz' explication and interpretation of the policy makes some sense, all things being equal. However, as Schultz testified, even the Respondent itself evidently felt the policy was problematic and saw fit to change it, although only after Gross filed the instant unfair labor practice charge.[31]

Gaynair seemed to realize his mistake and, in a feeble and stumbling way, attempted to extricate himself. However, the record is clear that Gaynair harbored a strong disapproval, even animus, toward nonmembers. This animus, combined with Gaynair's important representative position and role with respect to all unit members and his clear authority to act on and implement the policies of the Branch, gives his statements regarding the grievance process special weight. Gaynair's statement to Gross clearly conveyed to me the idea that with membership there was privilege, and with a nonmembership a detriment to the employees. In my view, this created a potentially coercive effect on the unit employees in the exercise of their rights to participate in the grievance process and/or to join or refrain from joining the Union.[32]

Additionally, Gaynair's statement to the extent it reflects Branch policy is not only discriminatory but is arbitrary and irrational. In fact, neither Schultz nor Gaynair provided a rationale for not providing copies of grievance documents to nonmembers. While there may be some credible and reasonable basis for the policy, it was not articulated. Thus, for this reason also, the Respondent has violated the Act. *Letter Carriers Branch 529,* 319 NLRB 875 (1995).

CONCLUSIONS OF LAW

1. United States Postal Service is subject to the jurisdiction of the National Labor Relations Board by virtue of 39 U.S.C. §1209(a) (the Postal Reorganization Act).

2. The Respondent is a labor organization as defined in Section 2(5) of the Act.

3. By publishing in its monthly newsletter an article expressly or impliedly threatening to refuse to represent Howard K. Gross and other employees who made or make complaints against its officers and officials, and/or cooperate in Postal Service investigations of its officers and officials, and/or provide information against its officers and officials, the Respondent has failed to represent Howard K. Gross and other employees for reasons that are unfair, arbitrary, and invidiously discriminatory, and has breached the duties it owes the employees it represents.

4. By informing Howard Gross, an employee of the unit of employees it represents, that nonmembers of the Respondent were not entitled to copies of their grievance documents, the Respondent has failed to represent him for reasons that are unfair, arbitrary, and invidiously discriminatory, and has breached the fiduciary duties it owes Howard K. Gross, and has interfered with rights guaranteed employees under the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other respects.

[31] It would seem that as matters stand today, as explained by Schultz, Gross, then a nonmember of the Branch, was granted a sole exception to the policy of having nonmembers make their own copies of grievance documents. This arguably is discriminatory in itself. However, I need not reach this issue as it was not made a part of the request for amendment.

[32] I note that Gaynair's rendition of Branch policy regarding the providing of grievance documents may not have been reflective of the policy of the Branch at the time. However, irrespective of what the policy was or is, Gaynair clearly, in my view, made a statement that is discriminatory and must be redressed to effectuate the policies of the Act.

THE REMEDY

Having found that the Respondent has engaged in and is engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I recommend that the Respondent cease and desist threatening, impliedly or expressly, in its newsletter not to represent unit employee Howard Gross and other unit employees who make or made complaints against or cooperate in Postal Service investigations of its officers and officials, and/or who provide information to the Postal Service against its officers and officials. I further recommend that the Respondent provide to Howard Gross copies of the grievance documents he was denied in the instant case.

[Recommended Order omitted from publication.]